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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

CHARLES PEYTON WEST and MAURICE JOHN WEST,
Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals For the Sixth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Charles Peyton West and Maurice John West, respectfully pray for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decision rendered by that Court on June 25, 1941, in cause No. 8140, affirming the United States District Court for the Northern District of Ohio, Eastern Division. The opinion of the Circuit Court of Appeals sought to be reviewed, is not yet officially reported, but is part of the Record, and the decree of the District Court which was there affirmed appears on pp. 125, 126 of the Record, and its opinion on pages 116-120 of the Record.

SUMMARY STATEMENT OF MATTER INVOLVED.

This case was before this Court on Certiorari at the October Term, 1940. *West vs. American Telephone and Telegraph Co.,* 311 U. S. 223.

As shown by the opinion of this Court and the mandate, it was then decided, *inter alia,* that a rule of law announced

by the Court of Appeals of Ohio, an intermediate reviewing court, is a datum of what the Ohio law is, under the doctrine of *Erie Railroad Co. vs. Tompkins* (1938) 304 U. S. 64.

As correctly and fully shown in the facts stated in the opinion of this Court, such rule of law was announced by the Ohio Court of Appeals in a case in the state courts between the same parties as the parties in the instant suit, and on substantially the same subject matter.

The rule announced is—*That demand is prerequisite to an action at law* for damages against a corporation by vested remaindermen of shares of its corporate stock, where the corporation, with knowledge of the terms of a will creating a life estate and the vested remainder in the stock, had issued a certificate for the stock to the life tenant in her name without evidencing the remainder on the certificate, and the life tenant thereafter sold the stock without authority to a bona fide purchaser for value, and the corporation then cancelled the certificate in the life tenant's name and issued a new certificate in the name of her bona fide purchaser. The record in the state case did not show such demand, and in consequence the State Court of Appeals dismissed the case, because it thought that, for want of demand, the record did not show a cause of action. The highest Ohio court, the Supreme Court, refused to review the case.

After the decision announcing this rule on demand, and the dismissal of the case, by the Ohio Court of Appeals, and the refusal of the highest Ohio Court to review that decision, demand was made and refused, and this suit was thereupon filed by the remaindermen in the United States District Court, Northern District of Ohio, Eastern Division. This suit filed in the federal court is in Chancery; but, as above stated, it is between the same parties on the same matter except demand and refusal were pleaded and proved—by the vested remaindermen against the corporation. The prayer of the Bill of Complaint is for restitution

to the remaindermen of all rights in the stock which were lost as a result of the wrongful issuance of the certificate to the life tenant, and the sale of the stock by the life tenant, and the corporation's cancellation of the certificate at the instance of her bona fide purchaser, and the then issuance of a new certificate to the purchaser.

The petitioners here are the remaindermen; the testator was Charles P. West, Sr., petitioners' father, whose will was probated and estate administered in Cuyahoga County, Ohio, the life tenant was Grace C. West, the testator's widow and petitioners' stepmother, who is still living; and the corporation that wrongfully issued the stock to the life tenant and then cancelled the certificate, is respondent here.

No new facts were adduced after the remand.

The only facts in the record now material which were not stated in this Court's opinion, are the facts as to the places of the wrongs of respondent, and of the life tenant. The places of the wrongs become important because of the question of *Conflict of Laws* discussed below.

The trial court, that is, the District Court, made findings of fact and conclusions of law. The fourth and fifth Findings of Fact (R. 122) show the places of the wrongs, in words and figures as follows:

> "4. On or about February 2, 1927, there were delivered to the defendant at its transfer office in New York, certificates for 92 shares of common stock of the defendant duly endorsed by Grace C. West as executrix of the estate. Accompanying these certificates were certified copies (1) of her appointment as executrix; (2) of the Last Will and Testament of Charles P. West; (3) of her application for distribution in kind with consent of plaintiffs attached; and (4) of the journal entry of the Probate Court directing distribution to her. On receipt of these documents the defendant issued and delivered to Grace C. West by mail a new certificate in her name for said 92 shares of common stock, without noting thereon any limitation on her estate therein.

"5. On or about October 31, 1929 Grace C. West, then living near Boston, Massachusetts, without the consent and advice of plaintiffs, delivered said certificate for 92 shares to the Boston office of Paine, Webber & Co., brokers, as collateral for her individual account there. Attached to the certificate was an assignment and power of attorney to transfer, duly executed by Grace C. West. The Boston office of Paine, Webber & Co. forwarded the certificate to its New York office and on November 2, 1929, Paine, Webber & Co. delivered the certificate, together with the assignment and power of attorney, to the defendant at its transfer office in New York City and on November 4, 1929 the defendant issued a new certificate for 92 shares to or upon the order of Paine, Webber & Co. Paine, Webber & Co. continued to hold this certificate at New York City as collateral for Grace C. West's account until September 24, 1930, at which time it sold the stock on the New York Exchange and applied the proceeds to Grace C. West's individual account. Neither Paine, Webber & Co. nor the subsequent purchaser from it knew of any limitation upon the right of Grace C. West to sell said shares."

That is, in respect to the question of *Conflict of Laws*, the facts are—

The decedent's will was probated and his estate administered in Cuyahoga County, Ohio;

Respondent wrongfully issued the stock certificate in the life tenant's name in New York;

The life tenant disposed of the stock in Massachusetts; and

Respondent cancelled the West certificate in New York.

Petitioners have consistently contended that the corporation must respond to them on the theory that the life tenant's sale extinguished her life estate, and accordingly accelerated the vested remainder to the immediate use and possession of the remaindermen, as in all cases of a life tenant's disclaimer, or death, or other annihilation of the life estate; and that respondent was chargeable with knowl-

edge of this legal consequence, and should have protected and not cancelled the West certificate on November 4, 1929, when it was presented by the bona fide purchaser for transfer.

In the instant suit—that is in the suit in the federal courts—respondent corporation has insisted on these defenses (R. 123):

(1) *Res judicata*;

(2) Statute of limitations; and

(3) Laches.

The District Court denied all defenses, but held the remainder was *not accelerated*, and trusteed the stock until the life tenant's death (R. 124).

Then the Circuit Court of Appeals, in the first decision in 1939 (108 Fed. 2nd 347), held that federal courts were *not* bound to follow the view of the Ohio Court of Appeals that demand was necessary, and proceeded to decide that the suit was barred by the Ohio statute of limitations, and by laches.

That decision by the Circuit Court of Appeals was reversed by this Court in 1940 (311 U. S. 223), holding, as above stated, that the federal courts should follow the decision of the Ohio Court of Appeals that demand was necessary, as a datum of the law of Ohio on this point; and this Court held further that the suit was not barred by any statute of limitations, or by laches, and remanded the case, using this language in the opinion in respect to the remand—

> "The judgment will be reversed, but as other points involving questions of state law argued here were not passed upon by the Court of Appeals the cause will be remanded to that court for further proceedings not inconsistent with this opinion."

Upon the hearing in the federal Circuit Court of Appeals after the remand, three questions remained to be decided by that Court (Paragraph 1 of Opinion):

(1) Is the decision of the state Court of Appeals *res judicata* of the remaindermen's rights?

On this point the Circuit Court of Appeals agreed with the District Court that there was no *res judicata* on the merits, for the reason that in the instant case in the federal courts the pleadings and evidence supplied the missing element, namely, *demand*, for lack of which the state Court of Appeals dismissed the action; and that only the question of demand was *res judicata*.

(2) Did the life tenant's sale of the stock extinguish her life estate, and accelerate the vested remainder? And

(3) What is the measure of damages in case of acceleration?

The District Court denied acceleration; and the Circuit Court of Appeals likewise denied acceleration. Having refused to recognize acceleration, the measure of recovery was not decided by either court.

In the interest of brevity we omit the reasons given by the District Court for refusing to recognize acceleration.

In orderly sequence, we first state petitioners' reasons for claiming acceleration, and then, the reasons given by the Circuit Court of Appeals in its opinion for refusing to recognize acceleration.

PETITIONERS' REASONS FOR ACCELERATION.

As to acceleration, petitioners' claims are—

(a) That by the rules of *Conflict of Laws* the legal consequence of the tortious sale by the life tenant in Massachusetts, is governed by the law of Massachusetts, because that is the *locus delicti*.

(b) That by the law of Massachusetts *a tortious sale of personal property* by a life tenant extinguishes the life estate, and accelerates a vested remainder to the full possession and use of the vested remaindermen.

(c) That when respondent with knowledge of the will creating the life estate, and the remainder as well, issued the certificate of stock to the life tenant in 1927, without disclosing on the certificate the limited rights of the life tenant, or the remainder rights of petitioners, thus enabling the life tenant freely to dispose of it, respondent was to be charged with the legal consequences of the life tenant's sale wherever she might sell the stock; and when she did sell it in Massachusetts, respondent had to respond to petitioners according to the legal consequences of the sale by the law of that state;

(d) That, if, however, by the rules of *Conflict of Laws*, respondent must respond to petitioners according to the legal consequences of the life tenant's tortious sale, under the law of New York, because respondent's breaches of duty to petitioners occurred in that state, then the remainder is nevertheless accelerated, because the law of New York requires it to be treated as accelerated.

(e) That neither the life tenant, nor the respondent corporation, committed any wrongs in the State of Ohio, and therefore the law of Ohio, whatever the law of Ohio may be on the point of acceleration, cannot conceivably apply; and finally

(f) That the acceleration of the remainder interests necessarily results in the following remedy in chancery—

Restoration of the stock with all mesne dividends from the time of cancellation of the West certificate on November 4, 1929, to the present, interest on such mesne dividends, damages representing the difference in market value of the stock between the time of respondent's cancellation of the certificate in 1929, and the present market value, with interest on the difference.

On the other hand, on the question of acceleration of the vested remainder interests, respondent contends that the law of Ohio applies, and that by the law of Ohio the remainder is not accelerated; two of the three Ohio Court

of Appeals judges having so declared in a dictum in the state case between these parties.

REASONS OF CIRCUIT COURT OF APPEALS FOR DENYING ACCELERATION.

The reasons given in its opinion by the Circuit Court of Appeals for denying acceleration, are these—

(a) If the law of Massachusetts is to be applied, it was held by the Circuit Court of Appeals, the remainder is not accelerated, because, first, the Massachusetts cases cited by petitioners do not apply; and, secondly, a Massachusetts statute prevents acceleration.

(b) Acceleration, it was further held by the Circuit Court of Appeals, would amount to *a forfeiture* of the life estate in equity, the court citing on this point, the case of *Marshall vs. Vicksburg*, 15 Wallace 146, 149.

(c) Without expressly declaring that the law of Ohio governs acceleration in the instant case, or giving reasons why the Ohio law should govern, the Circuit Court of Appeals takes it for granted that the Ohio law is applicable, and proceeds to declare that under the decision by this Court in this case (311 U. S. 223), it is bound by the majority view of the Ohio Court of Appeals in the state case on acceleration.

As shown above, the Ohio Court of Appeals dismissed the case in the state courts for the assigned reason that the record did not disclose demand. This is the only point actually decided by that court.

Two of the three judges constituting the Ohio Court of Appeals did, in their opinion, by way of dictum, discuss the question of acceleration, and declared their view that *Carpenter vs. Denoon*, 29 O. S. 379, a case involving real property only, applied to corporate stock. (R. 75.)

The other one of the three Ohio Court of Appeals judges expressed the view that there *was* acceleration. (R. 79.)

The dictum of the two judges constituting a majority, would doubtless be a datum of the Ohio law on acceleration of the remainder in stock upon sale by the life tenant, if the law of Ohio applied. The question, however, is, can the law of Ohio apply under the rules of *Conflict of Laws*?

The Circuit Court of Appeals observes petitioners urge that a dictum is not a datum under *Erie Railroad Co. v. Tompkins*. Petitioners, it may be noted, do not take this position, and never have. The Court mistook petitioners' position. What we have urged, however, and do still urge, is, that a dictum is not a *decision* amounting to *res judicata* in respect to respondent's defense of *res judicata*. The lower courts having concluded that *res judicata* is not a good defense, we lay this point out of further consideration in this brief.

GROUNDS FOR GRANTING THE WRIT.

The Writ of Certiorari is accordingly sought on these grounds all of which are of *public importance*:

First, the Circuit Court of Appeals misconceived the law of the sovereign state of Massachusetts on the legal consequences of a wrongful sale of personal property by a life tenant. The Court thought such sale did not accelerate the remainder, whereas it would appear from the reported Massachusetts cases, that it does accelerate the remainder; and its decision is therefore *in direct conflict* with the law of that state settled by the pronouncements of its highest judicial court, but it should have been *in accord* with the law of that state.

Secondly, the Circuit Court of Appeals misconceived the decision of this Court in *Marshall vs. Vicksburg*, 15 Wallace 146, erroneously holding this case forbids acceleration of the remainder, for the alleged reason that such acceleration would involve *a forfeiture*, whereas, *Marshall vs. Vicksburg* cannot have any application to the instant case; and, further, as shown in brief in support hereof, the decision of the Circuit Court of Appeals on this point is in

direct conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit in *Big Six Development Company v. Mitchell* (1905) 138 Fed. 279.

Third, the Circuit Court of Appeals misconceived the application of *Erie Railroad Co. vs. Tompkins* (1938) 304 U. S. 64, to the instant case in this, that it supposed it was bound by an announcement made by a majority of the Ohio Court of Appeals on what the law of Ohio is on acceleration.

The Court is in error on this point, because the wrongs complained of did not occur in Ohio, but occurred in Massachusetts and New York, and, it is submitted, the law of these states must therefore govern. By the law of both these states the remainder is accelerated in the circumstances here under consideration. But the Ohio Court of Appeals did not declare what the law of these states is.

Wherefore, your petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and transmit to this Honorable Court a full and complete transcript of the record of said cause numbered and titled on its docket as: "Charles Peyton West and Maurice John West, Appellants, vs. The American Telephone and Telegraph Company, Appellee. Appeal No. 8140," and that the judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners be given a final decree establishing the rights for which they prayed in the Bill of Complaint filed in the District Court and to which they are entitled under the facts and law.

Respectfully submitted,

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Attorney for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

CHARLES PEYTON WEST and MAURICE JOHN WEST,
Petitioners,

vs.

THE AMERICAN TELEPHONE AND TELEGRAPH CO.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS.

The opinion of the Ohio Court of Appeals in the state case, is found in 54 Ohio Appellate Reports, 369, and also on p. 71 of the Record.

The Opinion of the United States District Court is found on p. 116 of the Record, and the court's findings of fact and conclusions of law on p. 121 of the Record.

The first Opinion of the United States Circuit Court of Appeals is reported in 108 Fed. (2nd) 347, and on p. 136 of the Record.

The Opinion of this Court is reported in 311 U. S. 223.

The second Opinion of the United States Circuit of Appeals is found in the Record, but at this writing has not been published in the Federal Reporter.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code as amended. (28 U. S. C. A. Section 347.)

The judgment of the Circuit Court of Appeals was entered on June 25, 1941.

ARGUMENT.

The facts under consideration are pleaded in the petition for the Writ of Certiorari, and are not repeated here.

I. The decision of the Circuit Court of Appeals that by the law of Massachusetts the tortious sale of personal property by a life tenant, without authority, does not terminate the life estate and accelerate the remainder, is in direct conflict with the settled law of Massachusetts, and is erroneous.

In *Phillips v. Allen* (1863), 89 Mass. 115, *a life tenant* of a farm cut standing trees on the farm and then sold them. When the remainderman discovered this, he filed *an accounting action in equity* to recover the value of the trees as of the time when they were sold. In response to the complaint of the plaintiff, the defendant pleaded the following defenses—

(a) That defendant was not liable for interest on the value of the trees;

(b) That she had to buy wood from others for fuel, and the value of the wood so bought should on the theory of her right to estovers, be set off against the value of the trees which she had cut and sold; and

(c) That since the time the trees were cut, there was a new growth which should be set off against the value of the trees cut and sold.

The court expresses its views on these defenses on page 116 of the opinion, holding all rights in the trees accelerated to the remainderman at the time they were severed—

> "The wood and timber when severed at once became the property of the plaintiff, as the person holding the estate in remainder. * * * In analogy to cases of conversion of personal property, it would be proper to add interest on the value of the wood and timber from the

time it was unlawfully taken by the defendant. It is true that the plaintiff had no right to the standing trees, or any profits arising therefrom, during the continuance of the life estate, and it is only by the illegal acts of the tenant for life that any such claim exists. But by such acts the right to the timber and wood thus cut vested at once in the plaintiff, and to the amount in value of this property the ordinary interest should be added in assessing the damages to the present time."

In *Leonard v. Stickney* (1881), 131 Mass. 541, the vendor of land remained on the premises sold, for a period agreed on between him and his vendee, as tenant of the vendee. During the period of tenancy, the vendor removed certain fixtures from the premises which were part of the realty. The vendee immediately filed replevin to recover possession of such fixtures. The vendor-tenant pleaded she had the right to use the fixtures during the period of her tenancy and therefore replevin could not lie until the right to possession had inured to the vendee-lessor at the termination of the period of the tenancy. But the highest court of Massachusetts held that the vendor-tenant's right to possession and use of the fixtures terminated and accelerated to the vendee immediately at their removal. On p. 545 of the opinion, the court cites and follows *Phillips v. Allen, supra,* and then announces the following rule—

"By the illegal act of the tenant for life, the remainderman is invested with the right to property to which otherwise he would have no claim except at the termination of the tenancy. * * * Where one violates the terms of a bailment of personal property, by removing it from the place where alone he was entitled to use it, or by selling it, the rule is similar. His wrongful act terminates his possession, and the bailor has a right to it immediately. * * * The defendant was the tenant of the plaintiff. Articles which were part of the realty were let to her for use on the premises during the term. If by her wrongful act she separated them, they became at once the personal property of the landlord, and all right of the wrongdoer ceased therein."

It is thus seen that the supreme judicial court of the State of Massachusetts applies the same rule to bailments, tenancies for years, and *tenancies for life*. On his conversion of the property the limited holder's rights in the property terminate and the expectant estate accelerates, and it is so held both in actions at law and in equity.

In *United Shoe Machinery Co. v. Holt* (1904), 185 Mass. 97, machinery was leased by plaintiff to defendant for the life of the patent issued thereon; defendant sold the machines without authority during the term of the lease. The court states the legal result of such conversion in syllabus 3—

> "Where a bailee of goods sells the property outright, without authority to do so, the bailment is ended, and the general owner has a right to immediate possession, on which he can maintain trover or equitable replevin."

United Shoe Machinery Co. v. Holt, supra, is cited with approval in *Potier v. Perry, Inc.*, 286 Mass. 602, at p. 608, decided in 1934. See, also, *Noyes v. Stone* (1895) 163 Mass. 490, for similar conclusion.

It would appear that a rule so definitely announced should not be misinterpreted.

The Circuit Court of Appeals assumes to state categorically that the above cases differ from the instant case, but fails to show in which particulars they do differ. Quite obviously stocks are the same sort of property as machinery and logs.

Indeed the above cases declare not only the Massachusetts rule, but the universal rule. *Tabb's Curator v. Cabell* (1867), 58 Va. 160; *Burwell v. Burwell's Guardian* (1884) 78 Va. 574; *Coffee v. Wilkerson* (1858) 58 Ky. 101; *Yeager v. Bank* (1894) 127 Ky. 751 (a corporate stock case); *Hercules Powder Co. v. Rowan* (1924) 245 Ill. App. 291.

But the Circuit Court of Appeals refers in its opinion to Section 9 of Chapter 184 of the Massachusetts Code as applicable to corporate stocks. This section provides—

> "A conveyance by a tenant for life or years which purports to grant a greater estate than he possesses or can lawfully convey shall not work a forfeiture of his estate, but shall pass to the grantee all the estate which such grantor can lawfully convey."

It will be noted that Chapter 184 of the Massachusetts Code, wherein this section appears, is headed—

> *"General Provisions Relative to Real Property."*

And its very phraseology makes it apply only to real property, and not to personal property at all.

This statute was doubtless enacted to abrogate the English common law rule applicable to real estate followed in *Commonwealth v. Welcome*, an early Massachusetts case reported in 5 *Dane's Abridgment of American Law*, p. 13, where a life tenant purported to convey a fee simple, and it was held—

> "* * * by his conveying an estate in fee, he destroys, and annihilates his own life estate; it ceases to exist, is thus put out of the way and is ended; and then the entry of him next in remainder or reversion, accrues, as it always does, when the life estate next preceding is terminated."

That the statute quoted is by its express terms applicable to real property only, is so obvious as to make further comment superfluous; and the Circuit Court of Appeals unquestionably erred in applying it to personal property.

Nor can a statute which abrogates a common law rule, be extended by implication. For a Statute—

> "* * * is not to be construed as altering the common law farther than the language of the statute clearly and necessarily requires." 25 *R. C. L.*, Sec. 281.

II. The Circuit Court of Appeals declares in its opinion that to accelerate the remainder—

> "* * * would amount to a forfeiture of the life estate, which is forbidden by the statute [above Massachusetts statute] and by the principles of equity, for it is axiomatic that equity does not favor forfeitures. *Marshall v. Vicksburg*, 15 Wallace 146, 149. Since the plaintiffs have seen fit to file a bill for equitable relief, they cannot complain that equitable principles are applied against them."

This statement, it is respectfully submitted, completely, and almost naively, misconceives the equitable principles adverted to, which are variously stated as, "Equity Abhors a Forfeiture," or "Equity Will Not Enforce a Forfeiture," or "Equity Will Relieve Against a Penalty or a Forfeiture."

Needless to say, in English Chancery the strict exactions of the common law were relieved against in order to promote the ends of justice, conformably to the maxim that "equity looks to the intent rather than the form." 1 *Pomeroy's Equity Jur.* (4th Ed.) Sec. 381.

But this principle has never been applied where the bad faith or voluntary acts of a party *ipso facto* repudiate and terminate a property right. Some of the cases cited above in this brief where the life tenant was held to have extinguished and thus terminated his life estate by his own tortious sale, were in fact chancery cases. Thus, in this regard, no distinction has been made between law cases and chancery cases.

The equitable doctrine against forfeitures is applied where a party to a contract, or lease, or mortgage, or other instrument, does not make strict performance on account of oppression, accident, fraud, surprise, ignorance. It cannot be applied to relieve against the consequences of wilful acts, or breach of faith. 10 *R. C. L.*, pp. 328 to 333.

In *Big Six Development Co. v. Mitchell* (1905) 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332, a case in

the Eighth Circuit in which this Court denied Certiorari, it was sought to cancel a lease on the ground that lessee had terminated the lease by voluntary violation of its terms, and to enjoin the lessee's continuing trespass on the property.

The court says on p. 284:

> "It is also urged that the bill cannot be maintained because it is a bill to enforce a forfeiture, and equity never lends its aid to enforce a forfeiture or penalty. But as we understand it, the theory of the bill is not that, but is that the forfeiture was complete before the bill was filed, that the lease was dead, and that the defendant was threatening and was guilty of a continuing trespass."

Thus it is obvious that *that case is in exact conflict with the case at bar.*

Would a court of equity refuse to recognize an accelerrated remainder where the life tenant elected not to take the life estate? The consequence is the same in both cases. *In legal contemplation the life tenant is dead.*

Albert M. Kales says in *Future Interests* (2nd Ed.) Sec. 599:

> "If the interests created are to A for life and *'at A's death'* then to B, by a long course of construction * * * 'at A's death' means 'at the termination of A's life estate, *whenever and however that may occur'*." (Latter italics ours.)

III. The Circuit Court of Appeals thought it was bound by the dictum of two of the three judges of the Ohio Court of Appeals that the case was governed by *Carpenter v. Denoon* (1876), 29 O. S. 379, a real property case.

There are several fallacies in this position.

The Circuit Court of Appeals does not expressly hold that the law of Ohio applies. This, however, is necessarily implied. For the court says:

> "We think it is unnecessary to discuss further the question of acceleration of the remainder interests, because upon this point we are bound (311 U. S. 223) by the declarations of the Ohio Court of Appeals."

Then the Court quotes from that part of the opinion of a majority of the Ohio Court of Appeals (R. 75) where the Court in a dictum applied *Carpenter v. Denoon, supra,* a real property ejectment case, to the corporate stock in question. However, as Judge Sherick of that court pointed out in his dissent (R. 79), *Carpenter v. Denoon,* being a real property case, cannot apply to personal property.

But even if *Carpenter v. Denoon* could properly be applied to personal property in the State of Ohio, the Ohio Court of Appeals *does not announce what the law is of Massachusetts or of New York* on the question of acceleration. The law of these states applies, it is submitted, because the wrongs in question were committed in these states, not in Ohio. That is, the corporation, in breach of its contractual obligation to plaintiffs, issued the stock *in New York* in such form as to enable the life tenant to dispose of it anywhere; she disposed of it in Massachusetts; and then in New York on November 4, 1929, after the life estate had been extinguished and the remainder had accelerated, the corporation, again in breach of its duty to plaintiffs, cancelled the evidence of their property interests, to their complete loss.

How, then, can the law of Ohio possibly apply?

The *Restatement of Conflict of Laws,* Sec. 378, *Comment b,* states the rule as follows:

> "Whether a particular harm which a plaintiff has sustained constitutes an injury for which he may recover compensation is determined by the law of the place of wrong."
>
> "The place of wrong is the state where the last event necessary to make an actor liable for an alleged tort takes place." § 377 of *Res. of Conflict of Laws.*

15 *C. J. S.*, Sec. 12, p. 896:

"The *lex loci delicti* governs the substantial aspects of torts and determines whether a right of action in tort has been created and its extent."

5 *R. C. L.*, Sec. 11, p. 917:

"The broad, uncontroverted rule is that the *lex loci* will govern as to all matters going to the basis of the right of action itself, while the *lex fori* controls all that is connected merely with the remedy."

We submit this is the settled rule. *American Banana Co. v. United Fruit Co.* (1909) 213 U. S. 347; *Le Forest v. Tolman* (1875) 117 Mass. 109; *Whitford v. Panama R. R. Co.* (1861) 23 N. Y. 465.

The bill in the case at bar pleads that by the law of Massachusetts the conversion of the stock there by the life tenant accelerated the remainder. It was thus called to the court's attention that the complainants relied on the law of Massachusetts. It is submitted the law of that state should be applied, unless good and sufficient reasons can be given why it should not. Such reasons have not been given.

The law of Massachusetts should apply because we are concerned with the legal consequences of the tort of the life tenant in that state in 1929. Although respondent's issuance of the stock to the life tenant in New York in 1927, was in breach of its duty to plaintiffs, this breach alone would not have caused a loss, but for the life tenant's invasion of the petitioners' rights in Massachusetts in 1929. So the act actually precipitating the loss, occurred in the latter state in 1929. This is "the last event necessary" to cause the loss.

The life tenant and corporation are equally liable as joint tort-feasors, when the life tenant sells the property. *Lowry v. Bank* (1848), Chief Justice Taney's Decisions, p. 310, at 331.

The corporation's initial wrong continues to the time of the loss, and thus the two wrongs are joint; but the

locus of the joint wrong is the place of the life tenant's tort. *Washington R. Co. v. Hickey* (1897) 166 U. S. 521.

As above shown, the law of Massachusetts is clear.

If, however, it be the correct view, that, since respondent's own breaches of duty to plaintiff occurred in New York, therefore, the *locus* of defendant's wrongs is New York, then the law of New York would appear to apply.

However that may be, it is submitted it is immaterial, because the law of New York on acceleration appears to be the same as the law of Massachusetts, and the law generally, on this point.

In *Moores v. Wait* (1829) 3 Wendell 104, at 108, the court laid down the same principle as that followed in the Massachusetts cases, *supra,* that a limited estate is extinguished by the waste or conversion of its holder, and thereupon the estate in remainder or reversion at once vests in possession.

There is no reason for saying that the law of New York is at variance with the general rule, but every reason that it is in accord.

Acceleration of remainders is recognized in New York. *Purdy v. Hoyt* (1883) 92 N. Y. 446; *In re Christie's Estate* (1927) 225 N. Y. S. 777, 130 Misc. 774.

In a *Note* on *"Acceleration of Remainders"* in *Annotated Cases,* 1914 A., p. 856, the rule is stated thus:

> "* * * where the taking effect in possession of the ulterior devise or remainder is postponed only in order that a life estate may be given to a life tenant, on the failure or destruction of the life estate the rights of the second taker are accelerated although the prior donee is still alive * * *."

In support of this statement the *Note* in *Annotated Cases* cites the two New York cases of *Mowatt v. Carow* (1838) 7 Paige 328; and *Taylor v. Wendell* (1857) 4 Bradford 324.

The true rule—that followed in both Massachusetts and New York—is thus stated in 33 *American Jurisprudence*, p. 621:

> "One entitled to a life estate may repudiate that right and elect to claim the estate under some other, a different, or an adverse title, and if he does, the remainder is accelerated and the remainderman becomes just as fully entitled to the immediate possession as if the life tenant had died. By renunciation or repudiation of a life estate is meant such an unequivocal act of the life tenant as would destroy his claim as life tenant so that he could not thereafter assert it, and would accelerate and mature the remainder."

That this is the rule to be applied in the case at bar, is hardly debatable. For how could the life tenant more effectually renounce or repudiate the life estate than by selling to a holder for value without notice, the whole property wherein the life estate existed? By so selling it, the life estate is necessarily merged in the remainder and ceases to exist, because the lesser estate disappears in the greater. Note, 93 Am. St. Rep. p. 153.

This was the situation which respondent's initial breach of duty in 1927 precipitated in 1929, of which it was charged with full cognizance when the West certificate was presented to it for transfer in 1929. Since it was charged with knowledge of the merger of estates and of the consequent acceleration of the remainder, it was defendant's duty in 1929 to preserve and protect plaintiffs' property rights, not to cancel the evidence of their property rights, to their total loss.

It may be added, without elaboration, that the *social*, and *philosophical* approaches to the question of the effect of a wrongful sale by the life tenant of personal property, lead to the same undoubted conclusion, as the more legalistic approach here discussed.

CONCLUSION.

In this brief we do not discuss the rules which fix the *measure of recovery* in event that the remainder interests are accelerated, because the lower court, having denied acceleration, had no occasion for applying the rules.

In event this Court grants the Writ, the rules of damages will be fully given in the brief on the merits. The rules are well settled, and the pertinent data to which they apply are not in dispute.

Respectfully submitted,

HARRY L. DEIBEL,
Attorney for Petitioners.

ORLIN F. GOUDY,
Personal Counsel for Maurice John West.

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

CHARLES PEYTON WEST and MAURICE JOHN WEST,
Petitioners,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

MOTION OF PETITIONERS TO PERMIT THE USE OF THE CERTIFIED TRANSCRIPT ON FILE.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Charles Peyton West and Maurice John West, respectfully move that they be permitted to use the certified transcript of the Record on file in this Court, on the hearing of their Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Your petitioners respectfully represent that the facts stated by this Court in the opinion in *West v. American T. & T. Co.*, 311 U. S. 223, state all the facts material to the further consideration of the case, except the facts that it was in Massachusetts that the life tenant disposed of the corporate stock in question, and it was in New York where the respondent wrongfully issued the stock to the life tenant and then cancelled the certificate.

These facts as to the places of the wrongs of the life tenant and of the respondent were stipulated by the parties (R. 46 and 47), and are fully stated in the District Court's Findings of Facts (R. 122), paragraphs 4 and 5, which

paragraphs 4 and 5 are quoted *in haec verba* in the petition for the Writ.

Your petitioners further represent that a reprinting of the Record would therefore serve no present purpose, except to show said places where the life tenant and the respondent committed wrongs, but would entail unnecessary and unreasonable expense to be added to the burden of the expense of petitioners' protracted and costly litigation in numerous courts.

Your petitioners further represent that in event this Court grants the Writ of Certiorari, such parts of the Record as are germane to the present inquiry will be furnished by them without demur.

HARRY L. DEIBEL,
Attorney for Petitioners.

Acknowledgment of Service.

Receipt of a copy of the above Motion is hereby acknowledged on this 15th day of September, 1941.

WILLIAM B. COCKLEY,
Attorney for Respondent.

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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. 623.

CHARLES PEYTON WEST, *et al.*,
Petitioners,

vs.

THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Certiorari.

SUPPLEMENTARY STATEMENT OF FACTS.

This case was admitted to this Court on certiorari in 1940 and a decision of the Circuit Court of Appeals denying any recovery to the plaintiffs* was reversed. *West v. American Telephone and Telegraph Co.*, 311 U. S. 223. On remand the Circuit Court of Appeals affirmed the judgment of the District Court which gave to the plaintiffs precisely what their father's will provided—a remainder interest after the death of their stepmother in 92 shares of stock of The American Telephone & Telegraph Company.

The plaintiffs are dissatisfied with this decree and they have filed this petition for certiorari in a further attempt to secure the following: (1) the immediate issuance to them of a certificate for 92 shares which would give them not only the remainder but the unexpired balance of the life estate of Grace C. West, who is still alive; and (2) the

* The petitioners were plaintiffs and the respondent was defendant. For convenience they are referred to in this brief as they appeared in the District Court.

dividends on such stock from November 2, 1929, when the alleged wrongful transfer took place to date; and (3) interest on the dividends; and (4) damages representing the difference between the highest market value reached after November 2, 1929, and the market value at the time of the demand; and (5) interest on such damages from the date of the demand.

The market value of the stock was approximately $235 per share on November 4, 1929, $275 at the highest intermediate value on April 15, 1930, and $165 on the day of demand (R. 48) and it paid $9 per share dividends in each year. What the plaintiffs ask with respect to each of the 92 shares is a new certificate for the entire interest, plus eleven years' dividends amounting to $99, and legal interest (6%) thereon amounting to $33, plus damages amounting to $110, plus interest thereon amounting to over $20. This would give the plaintiffs a recovery of $262 per share over and above the remainder on each share and, in addition, the dividends hereafter paid during the life of their stepmother. Such is the *equitable* relief to which plaintiffs claim they are entitled.

The legal theory by which they claim to support such a recovery is that the stepmother by her transfer of complete title forfeited her life estate and accelerated the plaintiffs' remainder. The Ohio Court of Appeals and both lower federal courts rejected this theory.

The defendant's liability is predicated on mere negligence in issuing stock certificates in the name of the plaintiffs' stepmother without any indication thereon that she was only a life tenant. The plaintiffs' stepmother, on the other hand, misappropriated to her own use the plaintiffs' interest in this stock.

ARGUMENT.

I. NO REASON FOR GRANTING CERTIORARI EXISTS.

The plaintiffs advance three reasons why, in their view, certiorari should be granted. (Pl. br. pp. 9, 10)

1. It is claimed that the Circuit Court of Appeals "misconceived the law of the sovereign state of Massachusetts." Manifestly misconception of state law by a federal court does not in itself raise any federal question, nor any question of public importance. In virtually every case in the federal courts based upon diversity of citizenship, it is claimed by one side or the other that the federal court has misconceived some state law.

The only clause of Rule 38(5)(b) of the rules of this Court which has to do with misapplication of state law is that referring to a decision of "* * * an important question of local law in a way probably in conflict with applicable local decisions * * *." The phraseology of this part of the rule obviously makes reference to the law existing before *Erie Railroad v. Tompkins,* 304 U. S. 64 (1938), when the only common law of the state binding on the federal courts was that deemed to be peculiarly "local." This Court may well have occasion to contract the scope of this part of Rule 38, as it has the part dealing with a conflict between decisions of the Circuit Courts of Appeals. (*Ruhlin v. New York Life Insurance Company,* 304 U. S. 202 (1938) discussed below.) Manifestly this Court cannot review all the decisions in which there is a claimed conflict with the state law which is applicable under *Erie Railroad v. Tompkins.*

In any event, it is plain that the question of Massachusetts law which the plaintiffs assert is involved in this case is anything but "important." Whether or not a wrongful conveyance by a life tenant results in acceleration of the remainder is a question having its genesis in the feudal land law of England. It applied only to livery of seisin, hence not to personalty, and with the use of the

bargain and sale as the customary conveyancing device the doctrine passed into disuse even at common law and has been abolished by statutes and decisions in the United States. 1 *Tiffany, Real Property*, 3rd Edition, Section 59; Laws of Massachusetts, Chapter 184, Section 89.

2. The second reason advanced by the plaintiffs for the granting of certiorari is that the Circuit Court of Appeals misconceived the decision of the Supreme Court in *Marshall v. Vicksburg*, 15 Wallace 146. However, the case of *Marshall v. Vicksburg* did not involve a federal question. The holding interpreted a contract. The dictum for which it was cited in this case had to do only with the general principle that equity abhors a forfeiture and was cited in passing by the court below only as corroborative of its view of the law of Massachusetts. (Supplemental Record, p. 5)

It should be noted that Rule 38(5)(b) of this Court refers to a decision of "a *federal* question in a way probably in conflict with the applicable decisions of this court." (Italics supplied)

Likewise, the case of *Big Six Development Company v. Mitchell*, 138 Fed. 279 (1905) did not involve a question of federal law. Therefore, even if there were a conflict between that decision and this no grounds for granting the petition for certiorari exist under the recent decision of this Court in *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202 (1938).

In the *Ruhlin* case it was held that on questions controlled by state law, conflict among the circuits is not a reason for granting a writ of certiorari. The *Big Six Development Company* case did not involve the law of Massachusetts or New York which the plaintiffs say should have been applied to this case, or Ohio, and, therefore, any conflict between the decision in that case and this is not a conflict in the application of the same law.

Furthermore, no conflict exists between this case and the *Big Six Development v. Mitchell* case. The latter case involved a lease of real property which, the court found, had been ended according to its terms by the lessee's breach. The case was an action to enjoin trespass on the plaintiff's land by the former lessee. Our case involves a testamentary bequest of a life estate in corporate stock. To say, as the plaintiffs do on page 17 of their brief, that the *Big Six Development Company* case "is in exact conflict with the case at bar" is completely unfounded. There is no resemblance either in facts or legal principles between the two cases.

3. The third reason for granting certiorari advanced by plaintiffs is that "the Circuit Court of Appeals misconceived the application of *Erie Railroad v. Tompkins* (1938), 304 U. S. 64, to the instant case in this, that it supposed that it was bound by an announcement made by a majority of the Ohio Court of Appeals on what the law of Ohio is on acceleration."* (Pl. br. p. 10)

The plaintiffs appear to be arguing that a reason for granting certiorari exists because the Circuit Court of Appeals applied the Ohio decision which held, on the very facts of this case, that the remainder was not accelerated. That is precisely what this Court held that the Circuit Court of Appeals must do on the question of demand.

It may be helpful on this point to review the recent history of the litigation. In its first decision the Circuit Court of Appeals disagreed with, and declined to follow, the decision of the Ohio Court of Appeals that a demand was a prerequisite of suit. The plaintiffs secured a reversal of that decision in this Court on the ground that no

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* The plaintiffs' disclaimer (Pl. br. p. 9) of any intention to argue that the decision of the Ohio Court of Appeals on the question of acceleration is not binding because it was a dictum makes it unnecessary to show, as we would otherwise have done, that that decision was not a dictum.

matter how much the Circuit Court of Appeals might disagree with the Ohio Court of Appeals, it must follow its decision in this case. On remand, the plaintiffs completely reversed their position and argued to the Circuit Court of Appeals that the decision of the Ohio Court of Appeals on the question of acceleration of the remainder was wrong, and that the Circuit Court of Appeals was not required to follow it. The Circuit Court of Appeals on remand followed the decision of this Court and applied that part of the decision of the Ohio Court of Appeals which was *against* the plaintiffs (acceleration) in the same way this Court applied that part which was *for* them (demand).

The plaintiffs argue, however, that the Circuit Court of Appeals was free to disregard the decision on the question of acceleration of the remainder, because the law of Ohio did not apply to the question of acceleration of the remainder. This argument is completely disposed of by the fact that the Ohio Court of Appeals, without discussing the matter, held that Ohio law did apply. The Circuit Court of Appeals said it was bound by the decision of the Ohio Court of Appeals (Supplemental Record, p. 5), and clearly under the very recent decision of this Court in *Klaxon Company v. Stentor Electric Mfg. Co.*, 61 Sup. Ct. Rep. 1020 (1941), it was so bound, although the holding of the Ohio Court involved a question of the conflict of laws. The plaintiffs have cited no other Ohio case as to what rule of conflicts should be applied, and consequently under the *Klaxon* case the decision of the Ohio Court of Appeals on the question of acceleration was applicable in the federal court even though the federal court should believe the conflicts rule which was applied to have been erroneous.

There was no objection or contrary argument on the part of the plaintiffs when the Ohio Court of Appeals applied Ohio law to the question of damages. An examination of the petition in the state court (R. 106 *et seq.*) dis-

closes no claim on the part of the plaintiffs that the law of any state other than Ohio applied to any part of the plaintiffs' claim.* If the foreign law is not pleaded it will be presumed to be the same as the law of Ohio. *Mendelsohn v. Mendelsohn*, 123 O. S. 11. Since the plaintiffs could not have raised the objection they now make even in the Supreme Court of Ohio on appeal, *a fortiori* they cannot raise it in the federal courts on collateral attack. Of course the Ohio Supreme Court is still free to apply a different conflicts rule in future cases if it chooses.

Although the Circuit Court of Appeals followed the decision of the Ohio Court of Appeals on the question of acceleration under the rule of *Erie Railroad v. Tompkins*, its decision can be equally supported by the doctrine of *res adjudicata*, which the defendant pleaded and urged in the court below and which is, therefore, open to it now under the decision in *Langnes v. Green*, 282 U. S. 531 (1931). The question of acceleration of the remainder was actually litigated and decided in the Ohio courts and the decision on that point is binding in the federal courts, even though the plaintiffs had available to them an argument as to the applicability of Massachusetts law which they did not present. *Stark v. Starr*, 94 U. S. 477 at page 485; *Aurora City v. West*, 7 Wallace 82 at page 102; *Quinn, Auditor v. State ex rel. Leroy*, 118 O. S. 48 (Headnote 1).

Thus, both by virtue of the decisions of this Court in *Erie Railroad v. Tompkins*, 304 U. S. 64 and *West v. American Telephone & Telegraph Company*, 311 U. S. 223, and by the application of the doctrine of *res adjudicata* the question of acceleration is finally determined in favor of defendant by the decision of the Ohio Court of Appeals.

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* The bill of complaint in the federal court alleges that Massachusetts law controls. (R. 4.) This was after the plaintiffs had been defeated on Ohio law.

II. THE PLAINTIFFS' CLAIM ON THE MERITS IS WITHOUT JUSTIFICATION.

The plaintiffs' entire brief in support of their petition* is devoted to the argument of the merits of the legal claim in this case. We do not understand it to be in accordance with the practice of this Court to answer fully such an argument at this stage. However, we feel required to comment on it very briefly.

Perhaps the most effective answer to the argument is to point out the absurd and highly inequitable conclusion which the plaintiffs reach as to the measure of recovery.

Briefly, they conclude that because their own stepmother misappropriated the remainder in their stock, receiving full value for that remainder, the defendant corporation, for negligently issuing a stock certificate which enabled her to commit this act, should be required not only to give them a remainder interest identical with that which their stepmother misappropriated but also (1) damages which, with interest, amount to $262 for each share of stock and (2) the enjoyment of the income from stock during the balance of their stepmother's life. This is the result to which the plaintiffs say the "*social* and *philosophical* approaches to the question * * * lead * * *." (Pl. Br. p. 21) Clearly the plaintiffs' philosophy and social values are contrary to those of courts of equity in all ages and all jurisdictions and it is unfortunate that the plaintiffs did not explain *why* tens of thousands of other stockholders in similar economic circumstances should pay plaintiffs a profit on their stepmother's wrong.

The plaintiffs' legal argument to reach this result has been rejected by the Court of Appeals of Ohio and the federal District Court and the Circuit Court of Appeals. The plaintiffs rely upon Massachusetts cases dealing with standing timber cut by a life tenant of real estate, fixtures on

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* Beginning on page 11 of their combined petition and brief.

real estate removed by a lessee, and shoe machinery, all easily distinguishable. *Phillips v. Allen,* 89 Mass. 115 (1863), involved *waste* by a life tenant; *Leonard v. Stickney,* 131 Mass. 541 (1881), involved *waste* by a tenant *for years,* and *United Shoe Machinery Company v. Holt,* 185 Mass. 97 (1904), involved a sale by a *bailee.*

But there is a difference even more fundamental. It is that in the only Massachusetts case cited by the plaintiffs where forfeiture affected the amount of recovery, the remainderman was seeking relief against the wrongdoing life tenant, whereas in this case the plaintiffs are seeking to use their hypertechnical theory of forfeiture against a third party to reap for themselves a profit out of the life tenant's wrong, when the third party was negligent at the most and received no benefit whatsoever from its negligence.

The petition for certiorari in this case presents no federal question and no question of public importance and should, therefore, be denied.

Respectfully submitted,

WILLIAM B. COCKLEY,
Attorney for Respondent.